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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. [redacted] 1249

BOARD OF TRANSPORTATION OF NEW CASTLE COUNTY, DELAWARE, *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CIVIL AERONAUTICS BOARD, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Board of Transportation of New Castle County, Delaware, successor to the powers and responsibilities of the New Castle County Airport Commission, petitioner below, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in *New Castle County Airport Commission* v. *Civil Aeronautics Board* on November 17, 1966, as to which the said Court of Appeals denied petitioner's petition for rehearing *en banc* on January 9, 1967.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit of which review is sought is reported at 371 F.2d 733. A true copy appears in Appendix A to this brief. The judgment of the Court of Appeals and the denial of petition for rehearing *en banc* also appear in Appendix A.

JURISDICTION

The judgment of the court below affirming the orders of the Civil Aeronautics Board ("Board") brought before it by Petition for Review was entered on November 17, 1966. R. 617. Rehearing was denied on January 9, 1967. R. 644. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Did the reviewing court of appeals have the discretion to refuse to set aside Board orders eliminating Delaware's east-west air transportation, after the Court found that the Board did *not* make the statutorily-*required* ultimate finding that the public convenience and necessity affirmatively requires such elimination, and after the Court held that this error was not, as the Government claimed, "inconsequential", in view of Section 10(e) of the Administrative Procedure Act which imposes a mandatory duty on a court reviewing administrative orders to "hold unlawful and set aside agency action found to be . . . not in accordance with law . . ." or in excess of "statutory authority" or "short of statutory right", and the decisions of this court in *City of Yonkers* v. *United States*, 320 U.S. 685 (1944); *United States* v. *Baltimore*

& Ohio R. Co., 293 U.S. 454 (1935); and *Mahler* v. *Eby*, 264 U.S. 32 (1924)?

2. Did the reviewing court err in approving the Board's decision made without reference to the Board's own, or indeed, any decisional standards, working rules, or criteria, other than the statutory phrase "public convenience and necessity"?

3. Did the court err in failing to decide relevant questions of law presented by petitioner when Section 10(e) of the Administrative Procedure Act imposes a mandatory duty on courts reviewing agency action to "decide all relevant questions of law"?

STATUTES AND REGULATIONS INVOLVED

The pertinent constitutional and statutory provisions and Board regulations are set forth in Appendix B to this brief.

STATEMENT

This case arose under the Board's policy of instituting investigations to determine if certificated air service should be eliminated—its so-called "use it or lose it" policy for subsidized local service air carriers. 14 C.F.R. 399.11.

Wilmington, Delaware, had been certificated for east-west air service since 1947. The Board found, and reaffirmed, that the public convenience and necessity required this service by multiple air carriers. *Cincinnati-New York Additional Service,* 8 C.A.B. 152, 163-64 (1947); *Middle Atlantic Area Case,* 9 C.A.B. 131, 146-47, 171, 172 (1948); *All American Renewal Case,* 17 C.A.B. 400 (1953); *Renewal of Allegheny Airlines Temporary Intermediate Points,* 33 C.A.B. 117 (1961).

The last-cited proceeding in 1961 involved a related question to that determined by the Board in the instant proceeding, to wit: whether Allegheny Airlines' authority to serve Wilmington on the east-west segment 3 of its certificate of public convenience and necessity for Route No. 97 should be renewed, and if renewed, whether the authority should be temporary or permanent. The Board found, pursuant to Section 401(d) of the Federal Aviation Act of 1958, as amended,[1] that this transportation service is *required* by the public convenience and necessity in light of the record having established that Wilmington could generate at least five daily passenger enplanements, this being the Board's principal decisional criterion for determining the need for subsidized air service by local service carriers. The Board renewed Allegheny's authority for the second time. (Authority for a temporary period was originally granted in 1948 in the *Middle Atlantic Area Case, supra,* and renewed for a further temporary period in 1953 in *All American Renewal Case, supra.*) The Board decided to renew this authority on a *permanent* basis.

The instant proceeding was initiated in 1963 and the hearing examiner concluded that the record showed that Wilmington could satisfy the five-a-day traffic standard of the "use it or lose it" policy, that the subsidy cost, if any, was minimal, and that the public need for this service was unabated, albeit Allegheny had not provided service necessary to meet the minimum needs of the market, *i.e.,* two daily round trips timed to provide commuter service in both directions. R. 509-16.

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[1] 72 Stat. 754, 49 U.S.C. 1371(d). The Federal Aviation Act of 1958, as amended, is referred to hereinafter as the "Act."

The Board, with only three of its five members participating, held that the examiner's approach was "unduly narrow": The Examiner had *erred* because he had based his decision on the specific criteria of the Board's "use it or lose it" policy! The Board said that the Examiner should have determined whether the service was "required", using the statutory phrase "public convenience and necessity" as the sole decisional criterion. R. 546-47. The Board thereupon concluded that the service was not required by the public convenience and necessity and ordered deletion of Wilmington from Allegheny's certificate describing service to the west.[2] R. 550-51. The Board did not find, as required by section 401(g) of the Act, that *elimination* of this historic certificated service was *required.*

Petitioner requested reconsideration. The Board conceded numerous errors and in a complete new opinion *assumed* that the standards of the "use it or lose it" policy were satisfied. It held again that the *service* was not required. R. 572-87. It did not find that *elimination* of the service was required.

The Board's action on reconsideration was taken *after* one of the three qualified and participating members, former Chairman Boyd, had left the Board. Mr. Boyd indicated his vote *in camera* (as did the other two participating members). Mr. Boyd left the Board prior to the Board meeting to discuss and decide the case: the meeting was held eight days *after* Mr. Boyd left. With only two of its five members qualified, the Board purported to "ratify" the decision promulgated on the *in camera* "notation" of

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[2] North-South service provided by Allegheny was not in issue.

the votes of three members. The Board's written procedures require a meeting to act on and ratify such "notation" votes. (See Appendix B.)

In two contemporaneous decisions, the Board granted petitions to rehear cases decided where the Board was left without a quorum of qualified members. In addition, in one of these cases, the Board granted rehearing because of acquisition of new aircraft affecting the economics and traffic potential of the service in issue. Although Wilmington's case involved a change in Board membership and acquisition by Allegheny of new aircraft types drastically affecting the economics and traffic potential of the route, the Board *without explanation* denied Wilmington's petitions for equal treatment.

Petitioner sought review by the Court of Appeals for the District of Columbia Circuit pursuant to Section 1006(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. 1486, 72 Stat. 795, and Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, 60 Stat. 243.

The court affirmed the Board. The court found, however, that the Board had not conformed to the statutory test for *eliminating* certificated service: "The Board's ultimate finding was that the public convenience and necessity did not require continuance of the service whereas the statutory test is satisfied only if the Board finds that the public convenience and necessity affirmatively requires deletion." The court was "not prepared to treat the difference as inconsequential, as the Government urges." 371 F.2d at 735.

The court did not rule on relevant questions of law presented and necessary to the issue of whether the

Board's orders should be set aside. The court, also, in petitioner's view, erroneously deciding the other questions it did reach. Petitioner sought rehearing by the Court of Appeals *en banc* which was denied by order without opinion.

ARGUMENT

This case presents neat and clear examples of the malaise of the administrative process which have been the subject of scholarly discussion,[3] congressional investigation,[4] and declarations of concern by the Supreme Court:

> "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion.'"[5]

This case involves a Board decision eliminating certificated air service without the statutory finding that such elimination is required by the public convenience and necessity. The reviewing court of appeals identified this as error, held it was substantial error, but permitted the error to stand in the "interest of justice". (See Point I, *infra.*)

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[3] See, *e.g.*, Judge Friendly's Holmes Lectures published under the title *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv.L.Rev. 863 (1962); REDFORD, NATIONAL REGULATORY COMMISSIONS: NEED FOR A NEW LOOK, Bureau of Governmental Research, University of Maryland (1959).

[4] See, *e.g.*, House Report No. 2711, 85th Cong. 2d Sess. (1959).

[5] *Burlington Truck Lines* v. *U. S.*, 371 U.S. 156, 167 (1962).

This case involves a Board decision which not only does not conform to the statutory standard, but does not conform to the Board's own criteria and working rules applied in similar cases, or indeed, to any criteria or working rules. The reviewing court of appeals permitted this to stand. (See Point II, *infra.*)

Finally, this case involves serious questions of "voting" by the Board without meeting, in contravention of the Board's own procedures and the Act, of unexplained inconsistent action, and of Board failure to consider statutorily-listed decisional factors. The reviewing court did not even discuss these errors. (See Point III, *infra.*)

This case thus presents the important problem of delimiting judicial control of administrative action which the Supreme Court has accepted as its singular responsibility. *N.L.R.B.* v. *Walton Manufacturing Company,* 369 U.S. 404 (1962); *Universal Camera Corp.* v. *N.L.R.B.,* 340 U.S. 474 (1951).

This relatively simple factual case, involving air service to only one point, focuses important problems of administrative decision-making and judicial responsibility. The courts of appeal are at sea, and are adopting widely different attitudes toward these questions. The time is ripe for the Supreme Court to announce guiding principles, and this case is a perfect opportunity to do so.

I. Failure To Make Statutory Findings Is "a Matter of Great Substance."

The delegation of legislative and judicial power to administrative agencies was approved by this court subject to the requirement that Congress must set the standards for administrative action. *Panama Refining*

Co. v. *Ryan*, 293 U.S. 388 (1935); *Schechter Corp.* v. *United States*, 295 U.S. 495 (1935).

In the Federal Aviation Act, Congress provided for certification of new service, or recertification of temporarily-authorized service, by the test of whether the service is required by the public convenience and necessity. Section 401(d) of the Act.

Congress imposed a different and more exacting test for elimination of certificated air service: the Board must affirmatively find that the public convenience and necessity *require elimination* of the air service. Section 401(g) of the Act.[6]

The court below held that the Board did not make the statutorily-required finding before certificated air service could be eliminated by Board order, and that this omission was a matter of substance. 371 F.2d at 735. The court below held that it had the discretion to refuse to vacate the Board's order. 371 F.2d at 735-36.

The Administrative Procedure Act contains Congress' mandatory declaration that reviewing courts

> ". . . shall . . . hold unlawful and set aside agency action . . . not in accordance with law; . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; . . ." Section 10(e), Administrative Procedure Act, 5 U.S.C. 1009(e), 60 Stat. 243.

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[6] *Cf.*, *Hall* v. *F.C.C.*, 237 F.2d 567 (C.A.D.C., 1956), involving merely diminution of broadcasting service:

> "That such a curtailment of service is not in the public interest is axiomatic." 237 F.2d at 572.

See also *Civil Aeronautics Board* v. *Delta Air Lines, Inc.*, 367 U.S. 316 (1961).

The court below thus erred by violating a clear congressional direction to set aside agency action not in accordance with law and the agency's jurisdiction. This Court should grant certiorari to declare, for the benefit of all courts reviewing administrative agency action, the necessity of strict obedience to congressional standards.

Even before the Congress spoke in the Administrative Procedure Act, this Court had announced that agency obedience to statutory standards was required on constitutional grounds. It was considered "a matter of great substance":

> "This is not to insist on formalities and to burden the administrative process with ritualistic requirements. It entails a matter of great substance. It requires the Commission to heed the mandates of the Act and to make the expert determinations which are conditions precedent to its authority to act." *City of Yonkers* v. *United States,* 320 U.S. 685, 692 (1944).[7]

The Board here did not make the "expert determination" that elimination of Wilmington's service was required by the public convenience and necessity. This determination is a "condition precedent to its authority to act." The court below, having held that

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[7] The court below's view is essentially the same as that taken by the three-judge court in *Public Service Commission of State of N.Y.* v. *U. S.*, 50 F.Supp. 497 (S.D.N.Y., 1943), in the appeal from an ICC decision in which it was alleged, as in the instant case, that the ICC had not made the finding, required by statute. The lower court affirmed the ICC, noting that the ICC had written "a careful opinion" and that the "evidence before the Commission was adequate." 50 F.Supp. at 499. This view, justified in dissent by Mr. Justice Frankfurter as avoiding an "insistence on such an empty formalism", was rejected by the Supreme Court in *City of Yonkers* v. *United States,* quoted above.

this determination was not made, should not have assumed that the Board will make the necessary finding upon remand. This is for the Board to do; not for a court to assume will be done.

Moreover, this error goes to the jurisdiction of the Board. The Board may not amend a certificate of public convenience and necessity except if it finds, affirmatively, that "the public convenience and necessity so require". Approving an action of the Board, where it has not made the required statutory finding, raises constitutional issues of unconfined delegation of legislative power.[8]

In *Mahler* v. *Eby*, 264 U.S. 32 (1924), Chief Justice Taft, writing for a unanimous court, reversed a district court which had sustained the issuance of warrants of deportation by the Secretary of Labor who had not made the "express finding", required by statute, that the petitioners were "undesirable residents". Not until their briefs to the Supreme Court did petitioners urge their claim that the warrants were, for this reason, defective and invalid. The Supreme Court held the "defect is jurisdictional", because

> "There is no authority given to the Secretary to deport except upon his finding after a hearing that the petitioners were undesirable residents." 264 U.S. at 43.

Another leading Supreme Court opinion, written by Mr. Justice Brandeis, in *United States* v. *Baltimore & Ohio R. Co.*, 293 U.S. 454 (1935), set aside an ICC order which had not made the statutory findings of "unnecessary peril to life or limb". These findings

[8] See *Kent* v. *Dulles*, 357 U.S. 116 (1958).

were held to be "quasi-jurisdictional findings essential to their constitutional or statutory validity." 293 U.S. at 465.

When a court identifies a legal error which is not "inconsequential", it must set the order aside. In *Jacob Siegel Co.* v. *F.T.C.*, 327 U.S. 608 (1946), the Supreme Court held that the Court of Appeals for the Third Circuit had erred in refusing to set aside an FTC decision after the Court of Appeals had found the remedy "too harsh".[9]

Review by this Court is required to reaffirm for the guidance of courts of appeals reviewing agency action the necessity of requiring adherence to critical, statutorily-required findings. It is not for a court to assume that the Board will find that the public convenience and necessity require elimination of this service, contrary to the Board's Examiner,[10] and contrary to the Board's own determinations four years earlier[11] and eight years before that[12] and five years before that[13] and one year before that.[14] The reviewing

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[9] This case is interesting because, on remand, under directions to consider less harsh alternatives, instead of justifying more fully its original conclusion, the Commission decided that another, less harsh, remedy would be appropriate. *Matter of Jacob Siegel Company*, 43 F.T.C. 256 (1946).

[10] R. 518.

[11] *Renewal of Allegheny Airlines Temporary Intermediate Points*, 33 C.A.B. 117 (1961): Segment 3 was renewed *permanently*.

[12] *All American Renewal Case*, 17 C.A.B. 400 (1953).

[13] *Middle Atlantic Area Case*, 9 C.A.B. 131, 146-47, 157, 172 (1948).

[14] *Cincinnati-New York Additional Service*, 8 C.A.B. 153, 163-64 (1947).

court's role and duty is to identify the error, and, on finding it is not "inconsequential", set aside the erroneous orders and remand the proceeding to the Board.

II. The Necessity of Definition and Adherence to Administrative Standards.

This case also presents, in an unusually neat and clear manner, the problems of an agency expressly departing from its own administrative standards and acting without reference to *any* decisional criteria, standards, or working rules. This problem has been focussed in the lectures of Judge Henry J. Friendly delivered at Harvard University, and printed in 75 Harv. L. Rev. 863 (1962) under the title, "Federal Administrative Agencies: The Need for Better Definition of Standards."

Definition of, and adherence to, definite decisional criteria, standards, or working rules has been held by this court necessary to the constitutional administration of an agency's powers. *Kent* v. *Dulles*, 357 U.S. 116 (1958).

Congress has set forth a policy requiring establishment of administrative decisional criteria and the giving of notice to affected parties. Sections 3(a) and 5(a), Administrative Procedure Act.[15]

The Courts of Appeal have grappled with this important area of judicial control of administrative action, and have taken widely divergent views.

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[15] 5 U.S.C. 1002(a), 60 Stat. 238; 5 U.S.C. 1004(a), 60 Stat. 239.

The Court of Appeals for the First Circuit has applied Judge Friendly's thesis, and held in *City of Lawrence, Mass.* v. *C.A.B.*, 343 F.2d 583 (C.A. 1, 1965):

> ". . . where Congress charges an agency with administering a statute in such broad terms as 'public convenience and necessity' it is imperative for the agency to narrow, clarify and explain this general directive 'to the point of affording a fair degree of predictability of decision in the great majority of cases, and of intelligibility in all.' Friendly, op. cit. p. 14. Standards are necessary, as Judge Friendly suggests, for reasons of fairness, to encourage the security of transactions, and to maintain the independence of the agencies; . . ." 343 F.2d at 587.

The Court of Appeals for the Fifth Circuit has uttered a similar demand for articulation of clear standards for decision. In *Hill* v. *F.P.C.*, 335 F.2d 355 (C.A. 5, 1964), the Court held,

> ". . . it is too late for an Agency to declare the standards to be met by its decision holding that they have not been met." 335 F.2d at 356.
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> * * *
>
> ". . . the Commission had the duty at some stage prior to the close of proof to declare what it considered the relevant standards to be." 335 F.2d at 358.

On the other hand, the Court of Appeals for the Seventh Circuit has held that "definitive criteria" are not necessary. In the recent *United Air Lines, Inc.* v. *C.A.B.*, 371 F.2d 221 (C.A. 7, 1967), the Court said,

> "It is evident from these broadly-phrased objectives that a 'public convenience and necessity' determination may be made without strict ad-

herence to rigid or definitive criteria . . ." 371 F.2d at 224.[16]

In the instant case, the Examiner had applied the Board's standards of the "use it or lose it" policy and held, as the Board had held in its prior cases reviewing the same service, that Wilmington could enplane five daily passengers, given a reasonable pattern of service, which Allegheny could provide at reasonable subsidy cost. The Board rejected the Examiner's "approach" and held that it could decide the case without *any* standards other than the ultimate statutory standards of "public convenience and necessity." R. 546.

The factors which the court below said the Board "balanced" (inconvenience, traffic and subsidy cost) are not factors applied in "use it or lose it" cases. They are the factors applied in "regional airport" cases. The Board did not deny this. It argued that it could, without notice or precedent, apply these factors because "the ultimate standard in either case is the public convenience and necessity."[17]

The Court, mistakenly, believed that petitioner was challenging the process of weighing and balancing.[18]

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[16] Only one year earlier, in *Outagamie County, Wis.* v. *C.A.B.*, 355 F.2d 900 (C.A.7, 1966), this same court reviewed a Board order in terms of the Board's application of the relevant criteria. The Court said,

> "We think the Board here did 'narrow, clarify and explain' the 'general directive' of public convenience and necessity in accordance with Judge Friendly's statement quoted in City of Lawrence, 343 F.2d at 587." 355 F.2d at 908.

[17] Board Brief to the Court of Appeals, p. 34, n. 40.

[18] "Petitioner contends that the balancing approach, though utilized by the Board in proceedings to certify a regional airport, is contrary to the Board's established approach in decertification proceedings involving the 'use it or lose it' policy." 371 F.2d at 734.

Petitioner was not. Petitioner was challenging the application of "regional airport" factors to a "use it or lose it" case. Indeed, as the Examiner found,[19] had the Board applied its own established standards for decision in a "use it or lose it" case, the service would not have been eliminated.

The critical difference between arguing and appraising the same evidence in light of different factors is demonstrated by the almost contemporaneous decision of the Board, in a "regional airport" case involving this same point, Wilmington, Del.: In *Eastern Air Lines, Redesignation of Philadelphia, Pa.-Wilmington, Del.*, Order E-22981, December 8, 1965,[20] the Board found that Wilmington should not lose north-south service by *two* air carriers, Allegheny and Eastern.

The very contradiction of these two, virtually contemporaneous decisions, should have alerted the court to require an especially clear application of the relevant decisional criteria.[21] How can "regional airport" factors point toward eliminating Wilmington's service in an east-west direction but retaining it in a north-south direction, when east-west traffic has historically been approximately equal to north-south traffic?

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[19] R. 509-10.

[20] Attached to Petitioner's Brief to the Court of Appeals as Appendix E.

[21] *Cf., Boston and Maine Railroad* v. *U. S.*, 202 F.Supp. 830, 837 (D.C.Mass., 1962), affirmed per curiam, 373 U.S. 372.

III. The Court Did Not Decide All Relevant Questions of Law.

The Administrative Procedure Act directs that a court reviewing agency action must "decide all relevant questions of law," Section 10(e), which is only a reaffirmation of basic judicial responsibility. The court below did not consider or decide the following independent questions of law, which were necessary to decision, were presented to the reviewing court, were not controlled by the issues decided by the Court, and if decided favorably to petitioner, would be dispositive:

1. The court did not decide the necessary and relevant question of whether the Board's Supplemental Opinion and Order was legally adopted. There never was a meeting, in quorum assembled, of the three (of the five) Board Members who participated in the final Supplemental Opinion and Order, as required by Section 201(c) of the Federal Aviation Act. There never was a ratification of this opinion and order at a Board meeting by a qualified majority, as required by the Board's own procedures when its members preliminarily note their "votes" without meeting.

The Board did not deny that ratification was required by its own written procedures, nor did the Board deny that ratification was never properly accomplished. The Board maintained that it need not follow its own procedures because of a case[22] upholding an ICC procedure for voting without a meeting in motor carrier application cases. The ICC procedure, however, did not provide for ratification of actions taken without a meeting, while the Board's procedures do.

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[22] *T.S.C. Motor Freight Lines* v. *U. S.*, 186 F.Supp. 777 (S.D. Tex., 1960), affirmed per curiam *sub nom. Herrin Transportation Co.* v. *U. S.*, 366 U.S. 419 (1961).

The court upholding the ICC's procedure recognized that the weight of authority was against its decision authorizing agency action without a meeting, but endorsed the ICC's procedure for disposing of motor carrier applications, out of urgent necessity "as an aid in dealing with [the ICC's] tremendous workload." (186 F. Supp. at 786). The Board made no contention of any similar necessity to deal with an annual load of 60 formal air route cases compared to the ICC's workload of 5,784 motor carrier cases.[23]

2. The court did not decide petitioner's contentions that the Board had acted arbitrarily and capriciously in denying petitions for rehearing of Wilmington's loss of its last east-west air service when the Board contemporaneously, granted rehearing to Braniff, after the second denial of its request for Miami-Dallas authority, on the ground that "only two of the three Board Members who participated in the original decision were still Members of the Board" (exactly the same situation applied to Wilmington), and when the Board, contemporaneously, granted rehearing to Terre Haute's objection to losing TWA's air service without a replacement by Lake Central on the ground of changed Board membership and acquisition of new equipment by the applicant carrier, Lake Central (both of which situations applied to Wilmington).

The Board had little to say in justification of its unequal actions, other than that its discretion is broad. Petitioner is entitled to a reviewing court's decision on its claim that the Board acted arbitrarily and

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[23] The figures for annual case load are taken from Hearings, Subcommittee of the Committee on Appropriations, "Independent Offices Appropriations for 1967", p. 188; Civil Aeronautics Board Report to Congress, Fiscal Year 1966, p. 75.

capriciously in the exercise of its discretion, however broad it may be.

3. The court below did not decide the question of whether the Board was legally obligated to consider and find that its action eliminating the last east-west air transportation to the entire State of Delaware resulted in the "development", "encouragement" and "promotion" of air transportation. Section 102, Federal Aviation Act; *American Airlines* v. *C.A.B.*, 192 F.2d 417, 420 (C.A.D.C., 1951).

4. The court below did not decide the question of whether the Board was obligated to give express recognition to its duty to "recognize and preserve" the "inherent advantages" of air transportation. Section 102(b), Federal Aviation Act; *Schaffer Transportation Company* v. *United States*, 355 U.S. 83 (1957); *Commercial Transport, Inc.* v. *United States*, 173 F. Supp. 524, 528 (E.D. Ill., 1959).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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